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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE WAYNE WHITE,

Defendant and Appellant.

C069814

(Super. Ct. No. 06CR10400)

Convicted by plea of six felonies relating to construction fraud with excessive loss and white collar crime findings, defendant Bruce Wayne White was sentenced to state prison for an aggregate term of six years, execution suspended, and was placed on probation for 10 years. The court ordered defendant to serve a year in jail, to pay, among other things, victim restitution in the amount of \$210,000 at the rate of no less than \$1,750 per month commencing 30 days upon release from jail, and to submit financial declarations to probation every two months. The court revoked defendant's state contracting license.

A petition for revocation of probation was filed June 14, 2011, alleging that defendant failed to obey all laws and failed to pay restitution.

After a contested hearing, the court sustained both allegations finding that defendant drove under the influence of alcohol or drugs and willfully failed to make restitution payments.

The court terminated probation and executed the six-year sentence.

Defendant appeals. He contends insufficient evidence supports a finding that he had the ability and *willfully* failed to pay restitution. He does not challenge the evidence supporting the DUI finding. He claims remand is required because the record does not reflect the court would have terminated probation solely on the DUI finding. Concluding that sufficient evidence supports the trial court's finding that defendant willfully failed to pay restitution, we will affirm.

#### FACTS

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) "In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters

exclusively within the province of the trier of fact." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.)

At the probation violation hearing, with respect to the allegation that defendant failed to obey all laws, the prosecution presented a minute order reflecting that on July 22, 2011, defendant entered a plea of guilty to driving under the influence and was granted probation. With respect to the failure to pay restitution, defendant's probation officer testified that he met with defendant three months after he was released from jail and confirmed defendant's obligation to pay restitution. Defendant reported monthly, usually by mail, and never paid restitution.

A district attorney investigator recounted a recorded conversation between defendant and his wife while defendant was in custody in jail. Defendant said he "wouldn't be able to pay because he couldn't work, and that he wouldn't be working when he got out."<sup>1</sup>

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<sup>1</sup> As quoted in the investigator's report, defendant told his wife:

"No. Yeah, when I'm out of here, I'm out of here, unless I violate my parole, my probation. And the only way I can see doing that is if I have to pay her that money.

"And I don't have a job. And if I don't have a job, then how am I going to pay her? They took my livelihood away.

"Well, no, if I don't have the money to pay her, then I can't pay her. That's all. They can do what they want. I mean, whatever. Like Maegan said, what they will do with me is they'll put that up on a shelf somewhere. We'll see when I get out of here. I guess I'll have to go by there and just find out

Real estate investor Stan Lukowicz testified that defendant was a friend who he had known for about 30 years and with whom he had had many business dealings. About three months after defendant was released from jail, Jim Wilson, a contractor on one of Lukowicz's projects, asked whether he should hire defendant. Lukowicz had no objection. Lukowicz and Wilson planned to meet with one of defendant's victims, also a friend of Lukowicz's, to ask about the amount of wage garnishment. Lukowicz was open to defendant working for him if it meant defendant would pay restitution to the victim. But defendant never asked for a job or worked for either Lukowicz or Wilson. Defendant would have been hired as a laborer at about \$20 per hour because defendant had lost his contractor's license. Lukowicz characterized defendant as a good, skilled worker.

Defendant testified. Since his release from jail in August 2010, he signed up for and began receiving Social Security in the amount of \$1,185 each month. Recently, he also began receiving veteran's partial disability benefits in the amount of \$770 each month. His monthly expenses included \$500 for rent, which he paid to his daughter, \$60 for a cell phone, \$67 for car insurance, \$300 for gas, and \$300 for food. He had recently moved out of his daughter's residence and was paying \$1,000 per month in rent. He had approximately \$150 left after paying his expenses.

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exactly what it is that I can do. That's the way it goes, you know. Whatever."

Defendant claimed he had complied with all disclosure requirements and never hid any assets or income. Since his release, he tried to obtain a job supervising in construction but no one was hiring. Defendant acknowledged that Wilson offered him a job as a laborer. Defendant did not take the job because he is 63 years old. He was in school in Rancho Cordova learning a new trade.

Defendant claimed he would pay restitution if he had more discretionary income. He had been taking drug and alcohol classes through the Veteran's Administration (VA) at Mather and going to the Veteran's Center for posttraumatic stress disorder (PTSD) in Citrus Heights. He was arrested when he "self-medicated" with alcohol and tried to kill himself when his PTSD "triggered."

Although defendant had places to stay rent free or for as little as \$100 per month, he was in the process of moving into a new apartment in Folsom with over \$1,000 per month in rent. Although he had a bank account at Golden 1, he did not disclose that account and stated in financial disclosure statements that he had no money in the bank but admitted his Social Security check is deposited in that account. He failed to report two \$770 disability payments on his disclosure statements. When he was arrested for driving under the influence, he had \$250 cash which he used for bail. Although the VA paid for his trade school tuition, he paid \$600 for an ordered DUI class he took and \$300 to DMV to get his license. He admitted that Wilson would give him a job anytime he asked for it but he was going to

school and cannot work because he has "physical problems" with his shoulders and rotator cuffs. Defendant worked in the jail in the kitchen serving meals, washing cars, and folding laundry. He was receiving training to work on heating and air conditioning. He did not apply for any other work even though he had the ability to do so. He has not paid one cent of victim restitution.

The defense conceded that defendant violated probation due to his DUI conviction and the court found that allegation of the petition true. By a preponderance of the evidence, the court found defendant willfully failed to pay restitution to the victim, noting that defendant had been out of custody for one year, had the ability to work, had failed to seek employment, had friends who could provide a job and had not paid one cent in victim restitution. Based on the monthly amount defendant allegedly spent on gas, the court determined defendant was driving about 1,700 miles a month even though he did not have a job. The court found that defendant had discretionary income "enough to pay something." The court concluded there was no evidence defendant ever intended to pay restitution.

#### DISCUSSION

Penal Code section 1203.2, subdivision (a), provides in relevant part: "[P]robation shall not be revoked for failure of a person to make restitution . . . as a condition of probation unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay."

A preponderance of the evidence must support a probation violation to revoke probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 440-447; *People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) A trial court is "granted great discretion in determining whether to revoke probation." (*Rodriguez*, at p. 445.) "Absent abuse of that discretion, an appellate court will not disturb the trial court's findings." (*People v. Self* (1991) 233 Cal.App.3d 414, 417.)

The evidence supports the court's conclusion that defendant willfully failed and had the ability to pay restitution. Defendant disclosed he had no money in the bank when in fact he had a bank account at Golden 1 and he failed to report the \$770 veteran's disability payment. He claimed he paid \$500 each month in rent to his daughter but had places to stay rent free or for as little as \$100 per month and was in the process of moving to a new apartment with more than \$1,000 per month in rent. He did not explain his \$300 monthly expenditure for gas.

Defendant had \$250 cash for bail when he was arrested for DUI and paid about \$600 for the ordered DUI class. Defendant seemed to have cash available for everything but restitution. Defendant was a good, skilled worker and Wilson and Lukowicz would employ him if he asked. Although he claimed he could not work as a laborer because he had "physical problems," he had worked in the jail and had been receiving training to work on heating and air conditioning. He had not applied for any other work and had not paid one cent of victim restitution.

Defendant argues that he was required to pay no less than \$1,750 per month in victim restitution and that the evidence showed he did not have the ability to make payments in that amount.<sup>2</sup> As the court determined, defendant made no attempt to increase his income and had not shown good faith by making even a single, partial payment.

Sufficient evidence supports the trial court's finding.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, ROBIE, Acting P. J.

We concur:

\_\_\_\_\_, BUTZ, J.

\_\_\_\_\_, MURRAY, J.

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<sup>2</sup> When probation was granted, the amount of restitution and the manner of payment were determined by the court upon the report of the probation officer or, with defendant's consent, by the probation officer subject to defendant's right to a hearing to dispute the determination. (Pen. Code, § 1203.1k.) The record on appeal does not include the probation report and does not reflect whether defendant disputed the amount of restitution or the manner of payment when probation was granted.